

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11**

Morgan Corp.

and

Russell Paul Bannan, an Individual

)
)
)
)
)
)
)

Case No. 10-CA-250678

**RESPONDENT'S EXCEPTIONS TO DECISION
AND ORDER OF ADMINISTRATIVE LAW JUDGE
AND BRIEF IN SUPPORT THEREOF**

October 22, 2020

Burr & Forman, LLP
1221 Main Street, Suite 1800
P. O. Box 11390
Columbia, South Carolina 29211
(803) 799-9800

SUBJECT INDEX

I.	EXCEPTIONS	1
II.	STATEMENT OF THE CASE	7
III.	QUESTIONS PRESENTED	16
IV.	ARGUMENT	17
	MR. BANNAN DID NOT ENGAGE IN PROTECTED CONCERTED ACTIVITY	17
	A. THE LEGAL STANDARD OF REVIEW	17
	B. THE SUBSTANTIAL EVIDENCE IN THE RECORD IS THAT MR. BANNAN ACTED SOLELY ON HIS OWN BEHALF	17
	MORGAN HAD GROUNDS UNRELATED TO ANY PROTECTED AND CONCERTED ACTIVITY TO TERMINATE MR. BANNAN	20
	A. THE LEGAL STANDARD OF REVIEW	20
	B. THE SUBSTANTIAL EVIDENCE IS UNCONTROVERTED THAT MR. BANNAN’S TERMINATION IS NOT A VIOLATION OF THE ACT	21
	MR. BANNAN'S TERMINATION IS NOT A VIOLATION OF THE ACT	26
	A. THE LEGAL STANDARD OF REVIEW	26
	B. MR. BANNAN’S TERMINATION IS NOT A VIOLATION OF THE ACT	27
	THE ADMINISTRATIVE LAW JUDGE’S CREDIBILITY DETERMINATIONS ARE HOPELESSLY INCREDIBLE, SELF-CONTRADICTORY, OR PATENTLY UNSUPPORTABLE	29
	A. THE LEGAL STANDARD OF REVIEW	29
	B. THE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE JUDGE’S CREDIBILITY DETERMINATIONS	30
	C. THE JUDGE IMPROPERLY SUBSTITUTED HER JUDGMENT FOR THE EMPLOYER’S	32

	REINSTATEMENT AND BACK PAY IS NOT THE APPROPRIATE REMEDY	32
	A. THE PROPOSED REMEDY IS IMPROPER.....	32
V.	CONCLUSION.....	34

TABLE OF CASES AND OTHER AUTHORITIES

<u>Cases</u>	<u>Page</u>
53 F.3d 261 (9th Cir. 1995)	23
53 F.3d 1002 (9th Cir. 1995)	21, 33
127 F.3d 34 (5th Cir. 1997)	28
310 NLRB 831 (1993)	23
388 U.S. 33	20
481 F.2d 714 (5th Cir. 1973)	26
662 F.2d 899 (1st Cir. 1981)	27
<i>Adelphi Institute</i> , 287 NLRB (1988)	25
<i>Alstate Maintenance, LLC</i> , 367 NLRB No. 68 (2019)	6, 19, 23, 24
<i>Alta Bates Medical Center v. NLRB</i> , 687 F.3d 424 (D.C. Cir. 2012)	30
<i>Anheuser-Busch, Inc.</i> , 351 NLRB 644 (2007)	34
<i>Bally’s Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir 2011)	29
<i>Big Ridge, Inc. v. NLRB</i> , 808 F.3d 705 (7th Cir. 2015)	28
<i>Cf Buddies Supermarkets, Inc.</i> , 197 NLRB 407	26
<i>Chamber of Commerce v. NLRB</i> , 721 F.3d 152 (4th Cir. 2013)	19
<i>Electrolux Home Products, Inc.</i> , 368 NLRB No. 34, (8/2/2019)	29

<i>Elston Elec. Corp.</i> , 292 NLRB 510 (1989).....	25
<i>Epic Systems v. Lewis</i> , 138 S.Ct. 1612 (2018)	19
<i>Erie Resistor</i> , 373 U.S. 221 (1963)	20
<i>Fibreboard Paper Products Corp. v. NLRB</i> , 379 U.S. 203 (1964)	33, 34
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	19
<i>Koch Supplies, Inc. v. NLRB</i> , 646 F.2d 1257 (8th Cir. 1981).....	25
<i>L.S.F. Transportation, Inc.</i> , 330 NLRB 1054	31
<i>Manno Electric</i> , 321 NLRB 278,fn. 12 (1996)	28
<i>McCarty Processors, Inc.</i> , 292 N.L.R.B. 359 (1989).....	31
<i>Meyers II</i> , 281 NLRB	19
<i>Meyers Industries</i> , 268 NLRB 493 (1984).....	22, 23
<i>Mike Yurosek & Son, Inc.</i> , 306 NLRB 1037 (1992).....	23
<i>Mushroom Transportation Co. v. NLRB</i> , 330 F.2d 683 (3d Cir. 1964).....	19, 24, 25
<i>N.L.R.B. v. Transp. Management Corp.</i> , 462 U.S. 393, 103 S.Ct. 2469 (1983)	17, 20, 21, 27
<i>Nichols Aluminum, LLC v. NLRB</i> , 797 F.3d 548 (8th Cir. 2015).....	29
<i>NLRB v. Cutting, Inc.</i> , 701 F.2d 659 (7th Cir. 1983).....	32

<i>NLRB v. Fleetwood Trailer Co.</i> , 389 U.S. 375 (1967)	20
<i>Parexel Int’l</i> , 356 NLRB 516 (2011).....	19
<i>Plastics Composites Corp.</i> , 210 NLRB 728 (1974).....	6, 26
<i>Prill v. NLRB</i> , 755 F.2d 941 (D.C. Cir. 1985)	22
<i>Retlaw Broadcasting Co.</i> , 310 N.L.R.B. 984 (1993).....	21, 33
<i>Roosevelt Memorial Medical Center</i> , 348 NLRB 1016 (2006).....	30
<i>Sam’s Club</i> , 349 N.L.R.B. 1007 (2007).....	22, 33
<i>Standard Drywall Products, Inc.</i> , 91 NLRB 544 (1950).....	31
<i>Taracorp Industries</i> , 273 NLRB 221 (1984).....	34
<i>Terracon, Inc.</i> , 339 NLRB 221	30
<i>Velox Express, Inc.</i> , 368 NLRB No. 61 (2019).....	19
<i>Wright Line</i> , 251 NLRB	21, 27, 28

Statutes

29 U.S.C. § 151	17, 20, 26
29 U.S.C. § 160(c)	17, 21, 27
29 U.S.C. §§ 158(a)(1), (3)	17, 20, 26

Regulations

29 CFR § 101.10(b)	27
--------------------------	----

Other Authorities

H.R. Conf. Rep. No. 510..... 34

H.R. Rep. No. 245..... 34

I. EXCEPTIONS

1. The Judge erred in her statement of the procedural history that Respondent was denied due process when on page 1 – page 2, line 20 by her specific finding that “I therefore find that Respondent was denied not due process by holding the hearing via videoconferencing.” and by her failure to consider evidence that undermined her decision and by considering only evidence that supported her fact-finding and for each and every other exception set forth by the Respondent.

2. The Judge erred by her failure to consider evidence that undermined her decision such as the undisputed fact that Bannan was hired to be assessed as a manager in an operator position and was to be re-evaluated in 90 days for a project management job. (Page 3, lines 35-37) thereby considering only evidence that supported her fact-finding.

3. The Judge erred by her failure to consider evidence that undermined her decision such as Bannan was in a probationary status for 90 days to be assessed as a manager and to learn the business from the bottom up before he was considered for a move into management (Page 3, lines 40-41).

4. The Judge erred by her failure to consider evidence that undermined her decision such as the well-known information that Bannan’s goal was project management (Page 4, lines 9-14).

5. The Judge erred by her failure to consider evidence that undermined her decision such as Bannan seeking out the early October meeting with Bill Heape to discuss the timing of his career progression into management (Page 4, lines 20-23).

6. The Judge erred by her failure to consider evidence that undermined her decision such as Bill Heape having no knowledge of Bannan’s attendance issues at the October 4 meeting and did not know until late October about his ongoing attendance issues (Page 4, lines 24-25) and by considering only evidence that supported her decision by suggesting that Bill Heape was responsible to inquire of Bannan about his attendance when the undisputed evidence was to the contrary (Page 4, lines 44-46).

7. The Judge erred by her failure to consider evidence that undermined her decision such as characterizing Bannan's discipline as progressive discipline when the uncontradicted evidence is to the contrary (Page 5, lines 11-15) and disregarding evidence to the contrary (R. Ex. 2, 3, 4, 5, 6, 7).

8. The Judge erred by inserting her own characterization of Weston's assessment of Bannan's performance and experience as a disciplinary matter when he stated that Bannan was at the bottom of his drivers which is consistent with him having no experience (Compare Page 5, lines 23-26, with Page 3, lines 31-37), as contrary to law under the facts of this case, by misstating the evidence, by her failure to consider evidence that undermined her decision and by considering only evidence that supported her decision.

9. The Judge erred by her failure to consider uncontradicted evidence of the October 24 telephone conversation between Bill Heape and Kenny Weston (Page 6, lines 32 – 34)(Ex. 11) and characterizing the discussion to fit her decision rather than based on the facts (Page 6, fn. 11).

10. The Judge erred by her failure to consider the uncontradicted evidence that Weston rated Bannan as his worst performing driver (Page 7, lines 3-5).

11. The Judge erred by her failure to consider the totality of the evidence that Bannan was hired as a probationary employee to be assessed for a management position, was placed in an operator position and then be assessed in 90 days to see if he was a fit for management (Compare, Pages 7, lines 7-17 with Page 3, lines 35-37), to support her finding which is contrary to law under the facts of this case, by misstating the evidence, by her failure to consider evidence that undermined her decision and by considering only evidence that supported her decision.

12. The Judge erred by her failure to consider the totality of the evidence to include failing to discuss the listed reasons for Bannan's termination as set forth in Respondent's consistent explanation as set forth in Exhibits 10 and 11 and instead cherry picking only language that supported Bannan's allegation, all of which is contrary to the law under the facts of this case, and by misstating the evidence, by her failure to consider evidence that undermined her decision and by considering

only evidence that supported her decision (Compare Page 7, lines 7-17 and lines 29-31; with Page 3, lines 35-37) with Heape's memorandum setting forth the following critical relevant information.

- Russell had two no-show days prior to a meeting that he requested of me on Friday, October 4, 2019 (these no-show days were not reported to me until the week of October 21st).
- I met with Russell at his request on Friday, October 4, to discuss his future with Morgan. Russell stated that he had been told that he would be transitioned to a salaried position after 90 days of employment and, when questioned as to who told him this, he stated that numerous people told him this. I reminded him that industry experience was needed for potential advancement into our salaried positions (his background and education were in non-construction related fields) and that we felt he needed more experience before that transition could be made. I then gave him an hourly bump in pay because I felt that he had made some progress towards a future salaried position. At this time, I was not aware of Russell's attendance issues and the complaints by fellow employees of Russell's constant name dropping¹.
- The following week Russell did not show up for work (he did initially notify us that he was sick and would not be coming in). Our team made several attempts to track his status throughout the week because his updates were sporadic and not in keeping with company policy². He provided a doctor's excuse upon his return and, at our request, a doctor's release.
- Upon Russell's return, it was reported to me that Russell told a more tenured operator the specifics of his hourly rate increase. This knowledge created unrest with our tenured operator

¹ To a direct question from the Judge concerning employee unrest, Heape testified as follows: "the unrest was that he was throwing Ben Boland's name around and creating issues with employees because he was name-calling or name-throwing." (Heape at p. 41, lines 21-25).

² Weston reached out to Bannan's friend Boland to assist in determining what was going with Bannan. (R. Ex. 17).

because Russell's hourly rate (adjusted for progress towards a future salaried position) was now higher than the tenured operator's rate (whose rate is in keeping with our established range for off road truck drivers).

Upon reviewing these issues, I explained to Russell that we needed to part ways³. **Russell then asked if he was being fired because he discussed his hourly rate with others on the job. I told him no**, and that it was a combination of several issues and that our employee handbook (present for the exit interview and signed by Russell when hired) makes specific allowance for us to part ways with those who we feel it is in Morgan's best interest to do so (Russell was still within the 90 day introductory period). Following this, the meeting ended. **It was my assessment that Russell's track record to date was an indication that he could not meet the standards for attendance, adherence to policy and professionalism required of our managers. Management was Russell's career goal and I did not see a path forward for him with Morgan (emphasis added).**

(Heape at p. 43, ln. 16 – p. 44, ln. 11; p. 44, ln. 22 – p. 45, ln. 20; p. 55, ln. 14-19; p. 57, ln. 15 – p. 59, ln. 4; p. 60, ln. 12-21; p. 63, ln. 1-5; Fields at p. 197, ln. 21 – p. 199, ln. 16; GC Ex. 4; GC Ex. 7; R. Ex. 11, p. 12-13; R. Ex. 12).

13. The Judge erred by her failure to consider the totality of the evidence to include failing to recognize the company's social contract (R. Ex. 1) and its policy as set forth in its handbook (R. Ex. 2) with the termination decisions in R. Ex. 14, specifically the "no-call, no-show" terminations (Page 8, lines 16-27) all of which is contrary to the law under the facts of this case, and by misstating the evidence, by her failure to consider evidence that undermined her decision and by considering only evidence that supported her decision.

³ See summary pre-meeting handwritten notes which are consistent with the post-meeting memorandum (Compare, R. Ex. 11, p. 12-13; R. Ex. 12).

14. The Judge erred by her failure to consider the totality of the evidence to include failing to recognize that Heape, after an independent assessment of all facts, made the termination decision and that Weston did not, all of which is contrary to the law under the facts of this case, and by misstating the evidence, by her failure to consider evidence that undermined her decision and by considering only evidence that supported her decision.

15. The Judge's credibility determinations fail to consider the totality of the evidence, are contrary to law under the facts of this case, by misstating the evidence in the case, by her failure to consider evidence that undermined her decision and by considering only evidence that supported her decision as follows:

A. Crediting Bannan's testimony of the Heape, Fields, Bannan, October 24 termination meeting when he testified that he only heard that he was terminated and nothing else. (Compare Page 8, lines 40-42, with transcript - (Bannan at p. 134, ln. 25 – p. 135, ln. 13; Heape at p. 43, ln. 16 – p. 44, ln. 11; p. 44, ln. 22 – p. 45, ln. 20; p. 55, ln. 14-19; p. 57, ln. 15 – p. 59, ln. 4; p. 60, ln. 12-21; p. 63, ln. 1-5; Fields at p. 197, ln. 21 – p. 199, ln. 16)).

B. Discrediting Heape's reason for termination as not being for wages when the uncontradicted evidence of record shows otherwise. (Compare Page 8, lines 44-45 with transcript – (Heape at p. 43, ln. 16 – p. 44, ln. 11; p. 44, ln. 22 – p. 45, ln. 20; p. 55, ln. 14-19; p. 57, ln. 15 – p. 59, ln. 4; p. 60, ln. 12-21; p. 63, ln. 1-5; Fields at p. 197, ln. 21 – p. 199, ln. 16; GC Ex. 4; GC Ex. 7; R. Ex. 11, p. 12-13; R. Ex. 12).

C. Discrediting Elsenpeter's Affidavit because he gave it while in Respondent's employment, while failing to discuss that he appeared as a witness for Counsel for the General Counsel and Elsenpeter admitted that everything in his affidavit was true and he would not change any of it even though he was no longer employed by the Respondent. Compare, Page 8, lines 28-29 with transcript - (Elsenpeter at p. 144, ln. 22 – p. 149, ln. 15; p. 151, ln. 12 – p. 156, ln. 4; p. 156, ln. 23 – p. 158, ln. 5; Bannan at p. 98, ln. 17-20; p. 100, ln. 4 – p. 101, ln. 11; p. 105, ln. 7 – p. 106,

ln. 10; p. 126, ln. 13 – p. 127, ln 8; p. 131, ln. 1-8; p. 136, ln. 15 – p. 138, ln. 13; p. 140, ln. 14 – p. 141, ln. 19; Weston at p. 169, ln. 15 – p. 172, ln. 11; R. Ex. 16; R. Ex. 19, p. 11-16)⁴.

16. The Judge’s decision is flawed and incoherent. She finds that Boland is an agent (Page 10, line 12) and then five paragraphs later finds that Boland was NOT an agent (Page 10, lines 48-49).

17. The Judge erred in her analysis that the subject of pay is sufficient in and of itself to rise to protected concerted activity under the law but is contrary to Board law.

18. The Judge erred in her analysis of *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019) as contrary to the law under the facts of this case, by misstating the evidence, by her failure to consider evidence that undermined her decision and by considering only evidence that supported her decision.

19. The Judge erred in her analysis of *Plastics Composites Corp.*, 210 NLRB 728 (1974) as contrary to the law under the facts of this case, by misstating the evidence, by her failure to consider evidence that undermined her decision and by considering only evidence that supported her decision.

20. The Judge erred in her Analysis, as contrary to the law under the facts of the case, by misstating the facts of the case, by his failure to consider evidence that undermined his decision and by considering only evidence that supported his decision.

21. The Judge erred in her Conclusions of Law as contrary to the law under the facts of this case.

22. The Judge erred in her Remedy as contrary to the law under the facts of this case.

23. The Judge erred in her Order, and the Proposed Notice to Employees, as not supported by the law or the facts of this case.

⁴ Counsel for the General Counsel and Claimant’s attorney objected to Respondent’s Exhibit 19, while Elsenpeter was calling in to the hearing as Counsel for the General Counsel’s witness.

II. STATEMENT OF THE CASE

The issues in this case relate to the hiring by Morgan Corp. (“Morgan”) of Russell Paul Bannan (“Bannan”) to be assessed as a manager in a position that would allow to him to learn the industry from the ground up and progress/become a supervisor, his employment and termination.

The record as a whole⁵ establishes the following uncontradicted factual background. Upon the recommendation of his friend, Ben Boland (“Boland”), an Estimator at Morgan⁶, Bannan filed an application for employment. (Bannan at p. 92, ln. 17-23; p. 123, ln. 8-12; Heape at p. 51, ln. 23 – p. 52, ln. 15; Linder at p. 73, ln. 21- p. 74, ln. 6; R. Ex. 5; R. Ex. 11, p. 6 -7; R. Ex. 7). Bannan’s resume and application, particularly the salary he was seeking, reflected a management background. (Bannan at p. 121, ln. 13 – p. 122, ln. 14; p. 122, ln. 17-23; R. Ex. 4; R. Ex. 5). Bannan interviewed with Bill Heape (“Heape”) and Jeff Fields (“Fields”) (Bannan at p. 122, ln. 17-23; Heape at p. 49, ln. 13-18; Fields at p. 196, ln. 23 – p. 197, ln. 18; R. Ex. 11, p. 1-3). Bannan’s application, resume and interview indicated that he was looking for a supervisory/management position in the \$60,000 range, not the job listed on his application. (Bannan at p. 123, ln. 16 – p. 124, ln. 3; Fields at p. 196, ln. 23 – p. 197, ln. 18; R. Ex. 4; R. Ex. 5). After the interview, Heape sent an email to Jay Lynch, his boss, and asked him about the position that Morgan should offer Bannan. (Heape at p. 51, ln. 6-14; R. Ex. 11, p. 4-5). Mr. Lynch felt it best to place him in the job Bannan applied for and look at him to assess as a manager candidate after 90 days. (R. Ex. 11, p. 4).

Morgan offered Bannan the driver job. (Bannan at p. 85, ln. 13-17; Heape at p. 26, ln. 1-7; R. Ex. 3, 6). Morgan hired Bannan on or about August 14, 2019, and assigned him to its Rockingham, North Carolina job site. (Bannan at p. 85, ln. 20 – p. 86, ln. 4; Heape at p. 26, ln. 1-7).

Morgan followed its normal onboarding hiring process and had Bannan sign a number of forms. (Bannan at p. 85, ln. 16-17; p. 124, ln. 8 – p. 126, ln. 12; R. Ex. 2, 3, 6, 7). Among those forms

⁵ Reference to the record transcript will be by person’s name, page and line(s).

⁶ Boland was an Estimator – basically a sales job working with customers - the entire period of Bannan’s employment. (Linder at p. 205, ln. 24 – p. 209, ln. 15; Weston at p. 171, ln. 17 – p. 172, ln. 3).

were the employee handbook and its acknowledgment. (Bannan at p. 124, ln. 14 – p. 125, ln. 6; Linder at p. 67, ln. 7 – p. 68, ln. 24; p. 124, ln. 8 – p. 126, ln. 12; R. Ex. 2, 3, 4, 5, 6, 7)⁷. Bannan admits he received those forms and acknowledged his signature on each of them. (R. Ex. 3). Bannan further admitted that he understood the attendance and call-in policy for those times when he could not be at work. (Bannan at p. 132, ln. 5-7; R. Ex. 2, 3). Bannan further admitted that Morgan’s handbook did not have a prohibition about discussing wages on the job and that no one in management ever stopped him from having discussions about wages with other employees. (Bannan at p. 127, ln. 20 – p. 128, ln. 6; p. 128, ln. 11-21⁸; p. 133, ln. 16 -18; R. Ex. 2⁹). Kenny Weston (“Weston”), Bannan’s immediate supervisor at the Rockingham job, confirmed that there was no such policy; but that he discouraged discussions of wages as it tended to create problems among the crew. (Bannan at p. 86, ln. 21- p. 87, ln. 2; Weston at p. 167, ln. 4-24).¹⁰

Heape described Morgan’s work at the Rockingham job site for Vulcan Materials quarrying operation. (Heape at p. 19, ln. 19 - p. 20, ln. 3). There was a crew of about eight workers with a supervisor and project manager (Heape at p. 22, ln. 3-7; p. 24, ln. 3-16; p. 24, ln. 24 – p. 25, ln. 5; p. 26, ln. 7-15). The crew consisted of truck operators, an excavator operator, a blade operator and a bulldozer operator. (Heape at p. 25, ln. 9-18). Bannan was a truck driver. (Bannan at p. 85, ln. 23 – p. 86, ln. 4; Heape at p. 25, ln. 19-25; Weston at p. 167, ln. 17 - 24). During the relevant time period, Weston was the supervisor/job superintendent. (Heape at p. 24, ln. 7-23; Weston at. 167, ln. 4-24).

⁷ Bannan’s complete personnel file is R. Ex. 18.

⁸ In response to questions from the Judge, Bannan affirmed that there was no prohibition on discussing wages. (Bannan at p. 128, ln. 22 – p. 129, ln. 18).

⁹ Bannan attributes to Ronnie Rust a statement that Morgan’s policy is not to talk about wages when there is no such policy as he himself admits. (Bannan at p. 108, ln. 2-20).

¹⁰ Weston was clear in his testimony; answered every question put to him, did not dodge any question put to him by the Judge, Counsel for the General Counsel, Claimant’s counsel or Respondent’s counsel. He answered with common sense, down to earth responses; an individual who described real human reactions to discussions that occur in the everyday work world and what prompted the call to Headquarters on a non-performing employee. Weston at p. 181, ln. 15-23; p. 181, ln. 25 – p. 182, ln. 12; p. 185, ln. 17 -20).

Morgan's job at the Rockingham site was called an overburden stripping project to remove dirt from the quarry after Vulcan did its blasting to loosen the stone and gravel. (Heape at p. 23, ln. 9-24).

Once on the job, Jeremy Elsenpeter, an experienced truck driver, was assigned the job of helping to train Bannan. (Elsenpeter at p. 145, ln. 7-19 ; Weston at p. 167, ln. 25 – p. 168, ln. 4; Heape at p. 42, ln. 1-11; ln. 19-22; GC Ex. 6; R. Ex. 12). Weston was also charged with training Bannan to help him become a supervisor. (Weston at p. 167, ln. 20-24).

In late September 2019, after about six weeks on the job, Bannan began to have attendance problems. (Bannan at p. 132, ln. 5-10; Weston at p. 168, ln. 5-17). Two of those days were just before he sent Heape an email asking to meet with him. (Bannan at p. 132, ln. 21-25). Bannan's email was sent on October 3, 2019, asking for a meeting on October 4, 2019. (Bannan at p. 88, ln. 19 – p. 91, ln. 7; Heape at p. 52, ln. 16 -22; R. Ex. 11, p. 8). Bannan asked for the meeting with Heape to discuss his future with Morgan, specifically his belief that he would be moved to a salary position after ninety days. (Bannan at p. 129, ln. 22 – p. 130, ln. 16; Heape at p. 53, ln. 15 – p. 54, ln. 8; R. Ex. 11, p. 8; R. Ex. 12). The Bannan/Heape meeting had these key components: (1) Bannan's desire to understand when he would move to a salary position; (2) Heape's understanding that at that time Bannan was learning the ropes including some of the paperwork requirements; (3) Heape's decision to give Bannan a progression raise to a supervisory position as Bannan learned the job¹¹; and (4) no discussion at all about Bannan's missed days. (Bannan at p. 113, ln. 9-20; p. 131, ln. 5-14; Heape at p. 26, ln. 16 – p. 27, ln. 5; p. 27, ln. 20 – p. 28, ln. 20; p. 53, ln. 15 – p. 54, ln. 8; GC Ex. 2; R. Ex. 11, p. 3, 8). The October 4 meeting between Heape and Bannan had no discussion of any wages for any other employee – only the progression raise that Heape gave to Bannan; and there was never any meetings with anyone in management where wages of other employees was discussed. (Bannan at p. 132, ln. 11-25).

¹¹ Heape wrote on the standard Morgan form used for pay "Russell has taken on additional lead person-type duties as he seeks **to expand his knowledge of construction and understand Morgan's culture**". (Heape at p. 29, ln. 3-13; GC Ex. 2; R. Ex. 8).

Following the October 4, 2019 meeting, Bannan missed four more days of work including having “no call” “no show” days. (Bannan at p. 130, ln. 17-19; Weston at 168, ln. 8-17; R. Ex. 9; R. Ex. 17). During these four days, Weston was unable to have Bannan return his calls/contact efforts and texted Boland, Bannan’s friend, and the Morgan employee who referred Bannan, to secure his assistance in finding out what was wrong with Bannan. (R. Ex. 17).

Upon his return after his October absences, Weston disciplined Bannan. (Bannan at p. 114, ln. 18 – p. 117, ln. 14; p. 131, ln. 18 – p. 132, ln. 11; Weston at p. 174, ln. 24 – p. 175, ln. 11; GC Ex. 3¹²; R. Ex. 9).

Upon his return to work after the four day absence, Bannan talked about his meeting with Heape with Elsenpeter. (Bannan at p. 98, ln. 18 – p. 101, ln. 8; Elsenpeter at p. 145, ln. 22 – p. 147, ln. 21; Weston at p. 175, ln. 12 – p. 178, ln. 8; R. Ex. 19). Elsenpeter no longer works for Morgan as he had an off-the-job injury and could no longer perform the work as a truck driver. (Elsenpeter at p. 157, ln. 22 - p. 158, ln. 5). Elsenpeter, called by Counsel for the General Counsel as his witness, affirmed the following relevant facts:

1. I work for Morgan Corp. as an hourly paid employee and was asked to assist with the training of Russell Bannan.
2. Russell came to work in mid-August of 2019 and was assigned as an off-the road truck driver.
3. Almost from the beginning of his employment with the company he was dropping names of people that he knew in management and that because of who he knew he would soon be in management himself.
4. Initially, I tried not to pay attention to his name dropping and just do my job.

¹² Bannan did not miss any more days after the October 15 discipline. (Heape at p. 34, ln. 21 – p. 36, ln. 1; Weston at p. 180, ln. 23 - p. 181, ln. 10).

5. My personal view is that Russell was all about himself and really did not care about other employees.
6. I do not know the total number days, but I do recall that he missed a number of days of work after he was hired in August.
7. Having worked for at a number of different employers and jobs over the years, I understood the importance of regular attendance and that not being at work was not good, particularly for a new employee.
8. Throughout his employment he continued to name drop, that he was going to be in management and was really getting on my, and I believe others', nerves. I do not remember who specifically, but I did hear that some employees were so tired of his mouth that they were going to quit.
9. With the discontent among the employees, I did report this to supervision.
10. At no time during Bannan's employment did he attempt to engage me or to my knowledge any other employee in a discussion of wages or in any way try to speak on behalf of me or others about the wages we were being paid. The only thing he said about wages was that he individually got a raise for himself.
11. At no time did Bannan speak for me or to my knowledge others about their wages at Morgan.
12. Since I was working more closely than others on the worksite with Bannan as his trainer, I can say personally that I do not miss him being at the worksite since I do not have to listen to the constant name dropping and how he was going to be in management.

13. After he was let go, Bannan sent me the text attached message. The text message supported my opinion that he was only out for himself and was not engaged in any way with me or other employees about the wages being paid to us at Morgan.

(Elsenpeter at p. 144, ln. 22 – p. 149, ln. 15; p. 151, ln. 12 – p. 156, ln. 4; p. 156, ln. 23 – p. 158, ln. 5; Bannan at p. 98, ln. 17-20; p. 100, ln. 4 – p. 101, ln. 11; p. 105, ln. 7 – p. 106, ln. 10; p. 126, ln. 13 – p. 127, ln. 8; p. 131, ln. 1 -8; p. 136, ln. 15 – p. 138, ln. 13; p. 140, ln. 14 – p. 141, ln. 19; Weston at p. 169, ln. 15 – p. 172, ln. 11; R. Ex. 16; R. Ex. 19, p. 11-16)¹³.

Ralph Fulmore (“Fulmore”), an hourly employee, confirmed that he had no discussions with Bannan about wages and that he, like others, was aware that Bannan was talking about getting into management. (Fulmore at p. 162, ln. 8 – p. 163, ln. 6; p. 163, ln. 12 – p. 164, ln. 15). With regard to Garcia, the raise he received was part of annual review that the records show was taking place almost simultaneously at the time of Bannan’s onboarding. (Linder at p. 203, ln. 13 – p. 205, ln. 23; R. Ex. 20). Elsenpeter was the only witness presented by the General Counsel with whom Bannan discussed wage increase. (Elsenpeter at p. 144, ln. 22 – p. 149, ln. 15; p. 151, ln. 12 – p. 156, ln. 4; p. 156, ln. 23 – p. 158, ln. 5; Bannan at p. 98, ln. 17-20; p. 100, ln. 4 – p. 101, ln. 11; p. 105, ln. 7 – p. 106, ln. 10; p. 126, ln. 13 – p. 127, ln. 8; p. 131, ln. 1-8; p. 136, ln. 15 – p. 138, ln. 13; p. 140, ln. 14 – p. 141, ln. 19; Weston at p. 169, ln. 15 – p. 172, ln. 11; R. Ex. 16; R. Ex. 19, p. 11-16).

Elsenpeter did go to Weston to complain about Bannan as described in his testimony - the name-dropping, the absences, that Bannan was all about Bannan, and the wage increase. (Elsenpeter at p. 144, ln. 22 – p. 149, ln. 15; p. 151, ln. 12 – p. 156, ln. 4; p. 156, ln. 23 – p. 158, ln. 5; Weston at p. 169, ln. 15 – p. 172, ln. 11; R. Ex. 16; R. Ex. 19, p. 11-16). Weston thereafter contacted Heape

¹³ Counsel for the General Counsel and Claimant’s attorney objected to Respondent’s Exhibit 19, while Elsenpeter was calling in to the hearing as Counsel for the General Counsel’s witness.

about his concerns about Bannan. (Weston at p. 176, ln. 14 – p. 178, ln. 8; Heape at p. 54, ln. 11-22; GC Ex. 4; R. Ex. 11, p. 9)¹⁴. This contact occurred on or about October 24, 2019. (Heape at p. 38, ln. 2 – p. 39, ln. 23; p. 54, ln. 14-22; GC Ex. 6; R. Ex. 11, p. 9). Weston told Heape about Bannan's attendance issues, his talking about who he knew at corporate headquarters, that Bannan would soon be a supervisor and Bannan's raise¹⁵. (Weston at p. 169, ln. 2-11; p. 171, ln. 15 – p. 172, ln. 7; p. 176, ln. 14 – p. 178, ln. 8; Heape at p. 30, ln. 8 – p. 31, ln. 9; p. 54, ln. 14-22; GC Ex. 3¹⁶; GC Ex. 6; R. Ex. 11, p. 10; R. Ex. 17). In fact, Weston ranked Bannan as the worst of his truck drivers at the Rockingham site. (Weston at p. 168, ln. 18 – p. 169, ln. 1; p. 177, ln. 12-21). The October 24 conversation with Weston was the first Heape had heard of the name dropping, the performance concerns, and the attendance issues; there having been no mention by Bannan of the September absences in the October 4 meeting Bannan had requested to discuss his move into a salary position after 90 days of employment. (Heape at p. 56, ln. 4-8; R. Ex. 11, p. 13). After the conversation with Weston, Heape determined that Bannan was not going to make it as a supervisor at Morgan, and decided to terminate his employment. (R. Ex. 12; Linder at p. 74, ln. 16 – p. 75, ln. 2).

For the termination meeting on October 25, Heape asked Fields to join him. (Heape at p. 40, ln. 21 – p. 41, ln. 2; p. 54, ln. 23 – p. 55, ln. 7; Fields at p. 197, ln. 21 – p. 199, ln. 16; R. Ex. 11, p. 11; R. Ex. 12). Heape prepared some notes for the meeting and then wrote a memorandum of what occurred at the meeting. (Heape at p. 55, ln. 8-13; Fields at p. 197, ln. 21 – p. 199, ln. 16; R. Ex. 11,

¹⁴ Weston had a number of concerns, but the one that prompted him to finally contact Heape was Bannan's talking about his progression raise. (Weston at p. 183, ln. 15 – p. 185, ln. 20; p. 185, ln. 24 – p. 186, ln. 6).

¹⁵ There were no employees who came to Heape, the decision maker, or Weston after October 4 to discuss wages. (Heape at p. 56, ln. 13 - p. 57, ln. 6; Weston at p. 179, ln. 12-24).

¹⁶ At the time Weston issued the discipline to Bannan on October 15, 2019, Heape was not aware of Bannan's attendance issues. Heape only became aware of the attendance issues after being contacted by Weston on October 23, 2019, and then discussing that with Weston on the 24th. (Heape at p. 35, ln. 17 - p. 36, ln. 12; GC Ex. 5; R. Ex. 9; R. Ex. 12).

p. 12; R. Ex. 12). The termination meeting took place on October 25, 2019. Heape, Fields and Bannan were in the meeting. (Bannan at p. 111, ln. 8 – p. 112, ln. 11; p. 134, ln. 19-21; Heape at p. 40, ln. 21 – p. 41, ln. 2; Fields at p. 197, ln. 23 – p. 199, ln. 16). Heape’s memorandum set forth the following critical relevant information.

- Russell had two no-show days prior to a meeting that he requested of me on Friday, October 4, 2019 (these no-show days were not reported to me until the week of October 21st).
- I met with Russell at his request on Friday, October 4, to discuss his future with Morgan. Russell stated that he had been told that he would be transitioned to a salaried position after 90 days of employment and, when questioned as to who told him this, he stated that numerous people told him this. I reminded him that industry experience was needed for potential advancement into our salaried positions (his background and education were in non-construction related fields) and that we felt he needed more experience before that transition could be made. I then gave him an hourly bump in pay because I felt that he had made some progress towards a future salaried position. At this time, I was not aware of Russell’s attendance issues and the complaints by fellow employees of Russell’s constant name dropping¹⁷.
- The following week Russell did not show up for work (he did initially notify us that he was sick and would not be coming in. Our team made several attempts to track his status throughout the week because his updates were sporadic and not keeping with company policy¹⁸. He provided a doctor’s excuse upon his return and, at our request, a doctor’s release.

¹⁷ To a direct question from the Judge concerning employee unrest, Heape testified as follows: “the unrest was that he was throwing Ben Boland’s name around and creating issues with employees because he was name-calling or name-throwing.” (Heape at p. 41, ln. 21-25).

¹⁸ Weston reached out to Bannan’s friend Boland to assist in determining what was going with Bannan. (R. Ex. 17).

- Upon Russell's return, it was reported to me that Russell told a more tenured operator the specifics of his hourly rate increase. This knowledge created unrest with our tenured operator because Russell's hourly rate (adjusted for progress towards a future salaried position) was now higher than the tenured operator's rate (whose rate is in keeping with our established range for off road truck drivers).
- Upon reviewing these issues, I explained to Russell that we needed to part ways¹⁹. **Russell then asked if he was being fired because he discussed his hourly rate with others on the job. I told him no**, and that it was a combination of several issues and that our employee handbook (present for the exit interview and signed by Russell when hired) makes specific allowance for us to part ways with those who we feel it is in Morgan's best interest to do so (Russell was still within the 90 day introductory period). Following this, the meeting ended. **It was my assessment that Russell's track record to date was an indication that he could not meet the standards for attendance, adherence to policy and professionalism required of our managers. Management was Russell's career goal and I did not see a path forward for him with Morgan (emphasis added).**

(Heape at p. 43, ln. 16 – p. 44, ln. 11; p. 44, ln. 22 – p. 45, ln. 20; p. 55, ln. 14-19; p. 57, ln. 15 – p. 59, ln. 4; p. 60, ln. 12-21; p. 63, ln. 1-5; Fields at p. 197, ln. 21 – p. 199, ln. 16; GC Ex. 4; GC Ex. 7; R. Ex. 11, p. 12-13; R. Ex. 12). Heape and Fields attested to the accuracy of what was discussed at the meeting and the notes; Bannan could only remember that he was terminated. (Bannan at p. 134, ln. 25 – p. 135, ln. 13; Heape at p. 43, ln. 16 – p. 44, ln. 11; p. 44, ln. 22 – p. 45, ln. 20; p. 55, ln. 14-19; p. 57, ln. 15 – p. 59, ln. 4; p. 60, ln. 12-21; p. 63, ln. 1-5; Fields at p. 197, ln. 21 – p. 199, ln. 16).

¹⁹ See summary pre-meeting handwritten notes which are consistent with the post-meeting memorandum. (Compare, R. Ex. 11, p. 12-13; R. Ex. 12).

No other employee in the introductory period who missed at least six days kept their job. (Heape at p. 57, ln. 7-14; Linder at p. 75, ln. 16 – p. 76, ln. 18; R. Ex. 14; Weston at p. 178, ln. 21 – p. 179, ln. 5; p. 180, ln. 7-25).

III. QUESTIONS PRESENTED

1. Whether the Judge may make findings of fact and/or conclusions of law when there is no evidence to make such findings or conclusions? (Exceptions 1-23).
2. Whether the Judge may only consider evidence that supports her findings and conclusions, and ignore, fail and/or refuse to consider and/or discuss evidence that undermines her fact findings and conclusions? (Exceptions 1-23).
3. Whether the Judge may refuse to apply the law based on the facts of the case? (Exceptions 1-23).
4. Whether the Judge may make a composite credibility determination, or no credibility determination, so as to make it impossible to determine who and what parts of testimony she credited or discredited? (Exceptions 1-23).
5. Whether, based on the record as a whole the decision is factually and/or legally correct? (Exceptions 1-23).
6. Whether the Judge can contrary to the evidence substitute her opinion that the parties' uncontradicted mutual understanding that Bannan was being assessed for a management position can be set aside by the Judge? (Exceptions 1-23).
7. Whether the record as a whole supports the Judge's credibility determinations? (Exceptions 1-23).
8. Whether the totality of the circumstances supported Respondent's good faith decision to terminate Mr. Bannan? (Exceptions 1-23).
9. Whether the Company's discharge of Mr. Bannan, consistent with past practice for offenses of a similar nature, is a violation of the Act? (Exceptions 1-23).

10. Whether the Judge may propose an order, remedy, and a notice when there are no bases in the record to support the proposed remedies? (Exceptions 1-23).

IV. ARGUMENT

MR. BANNAN DID NOT ENGAGE IN PROTECTED AND CONCERTED ACTIVITY

A. THE LEGAL STANDARD OF REVIEW

The National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, makes unlawful the discharge of a worker because of union activity, 29 U.S.C. §§ 158(a)(1), (3); but employers retain the right to discharge workers for reasons unrelated to the employee's union activities. *N.L.R.B. v. Transp. Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469 (1983). When the General Counsel files a complaint alleging that an employee was discharged because of his union activities, the employer may assert legitimate motives for its decision. *Id.* In these types of unfair labor practice complaints, the General Counsel retains the burden of showing that the discharge is based in whole or in part on antiunion animus--that the employee's protected conduct was a substantial or motivating factor in the adverse action. *Id.* The General Counsel's burden is to prove the case by a preponderance of the evidence. *Id.*; *see also* 29 U.S.C. § 160(c). The burden then shifts to the employer to show that its actions would have been the same regardless of the alleged forbidden motivation. *Id.*

B. THE SUBSTANTIAL EVIDENCE IN THE RECORD IS THAT MR. BANNAN ACTED SOLELY ON HIS OWN BEHALF

The Judge does not recognize that this is not a standard case. From the outset, Morgan treated Bannan as a prospect for a management position bringing him on board to learn the Morgan culture and understand the industry. (Bannan at p. 121, ln. 13 – p. 122, ln. 14; p. 122, ln. 17-23; p. 123, ln. 16 – p. 124, ln. 3; Fields at p. 196, ln. 23 – p. 197, ln. 18; Heape at p. 51, ln. 6-14; R. Ex. 1; R. Ex. 4; R. Ex. 5; R. Ex. 11, p. 4-5). Morgan was consistent in this approach from the outset – hiring him to assess him as a management candidate, but learning the industry and Morgan's culture; observing him and his progress during his employment on these elements (learning the industry and Morgan's culture); and making the termination decision based on the same standards. Morgan assigned him job duties

so he could learn the business from the ground up and paid him the rate for that position. (Bannan at p. 85, ln. 13-17; Heape at p. 26, ln. 1-7; R. Ex. 3, 6). Throughout his employment Morgan and Bannan each understood he was being assessed for a management position and that he would be reviewed at 90 days to review his progress. Bannan's initiation of the October 4 meeting is uncontradicted evidence of his understanding of this process. (Bannan at p. 129, ln. 22 – p. 130, ln. 16; Heape at p. 53, ln. 15 – p. 54, ln. 8; R. Ex. 11, p. 8; R. Ex. 12). The uncontradicted evidence from the Heape/Lynch email pre-hire exchange and Heape's progression raise and write-up supports that intent – Bannan was expanding his knowledge of construction and seeking to “understand Morgan's culture”. (Heape at p. 29, ln. 3-13; GC Ex. 2; R. Ex. 1, 8, 11).

The termination decision, made by Heape, not Weston, based upon Heape's independent review of the facts, was consistent with Bannan and Morgan's understanding of his employment – that he was being assessed for a position in management and that his attendance, failure to follow policy and lack of professionalism required of a Morgan Manager were the reasons behind Heape's decision to terminate. (Heape at p. 43, ln. 16 – p. 44, ln. 11; p. 44, ln. 22 – p. 45, ln. 20; p. 55, ln. 14-19; p. 57, ln. 15 – p. 59, ln. 4; p. 60, ln. 12-21; p. 63, ln. 1-5; Fields at p. 197, ln. 21 – p. 199, ln. 16; GC Ex. 4; GC Ex. 7; R. Ex. 11, p. 12-13; R. Ex. 12). This is a consistent theme from the decision to hire him, the progress meeting on October 4, and the final decision.

What the Judge misses in her analysis is that all of what Bannan did was for himself and any discussion he had about wages does not rise to level necessary for that topic to be both protected **AND** concerted as required under Board precedent²⁰. She further overlooks Bannan's own testimony that

²⁰ Her reliance on *Paraxel Int'l*, 356 NLRB 516 (2011) is misplaced. No discussion that Bannan had with any employee was for their “mutual aid and protection” as required by Section 7. Moreover, *Paraxel* did not overrule *Meyers Industries* and that remains the operative Board law. The present Board in *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019) sets forth the correct criteria to analyze any discussion of wages by employees. The Supreme Court's decision in *Epic*

no member of management ever stopped or prevented him from talking about wages. (Bannan at p. 127, ln. 20 – p. 128, ln. 6; p. 128, ln. 11-21²¹; p. 133, ln. 16-18; R. Ex. 2). Importantly there is no evidence in the record that any discussion Bannan had with a co-worker prevented any other employee from discussing his wages with a member of management, nor that any discussion was for the purpose of mutual aid and protection. (Elsenpeter at p. 144, ln. 22 – p. 149, ln. 15; p. 151, ln. 12 – p. 156, ln. 4; p. 156, ln. 23 – p. 158, ln. 5; Weston at p. 169, ln. 15 – p. 172, ln. 11; R. Ex. 16; R. Ex. 19, p. 11-16). Activity that at its inception involves only a speaker and a listener, as in this case, is concerted only if it is “engaged in with the object of *initiating or inducing or preparing for group action or . . . had some relation to group action in the interest of the employees.*” *Id.* (quoting *Meyers II*, 281 NLRB at 887) (emphasis added, internal quotations omitted); see also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). “[M]ere talk” or “griping” that does not “look[] toward group action” would not be protected in any event. *Id.* *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) teaches that these uncontradicted facts must be considered by the Judge and they were not. Her decision is flawed and should be reversed.

Moreover in *NLRB v. Great Dane Trailers, Inc.*, the Supreme Court recognized the Board’s duty to strike the appropriate balance between an employers’ asserted business justifications and the exercise of employee Section 7 rights in light of the Act and its policy. 388 U.S. 33-34 ((1967)(citing *Erie Resistor*, 373 U.S. 221, 229 (1963))); See also *NLRB v. Fleetwood Trailer Co.*,

Systems v. Lewis, 138 S.Ct. 1612 (2018) recently resoundingly rejected the Board’s attempts to read into Section 7 new substantive rights (class action) such as those announced in *Parexel* (pre-emptive strike). Other Courts and the Board itself have called into question the Board’s efforts to create rights not in the statute. See, *Chamber of Commerce v. NLRB*, 721 F.3d 152, 163 (4th Cir. 2013)(Court rejects attempt to create new ULP based upon failure to post notices educating employees about their Section 7 rights); *Velox Express, Inc.*, 368 NLRB No. 61 (2019)(Board rejects unprecedented argument that an independent contractor misclassification is a per se §8(a)(1) violation).

²¹ In response to questions from the Judge, Bannan affirmed that there was no prohibition on discussing wages. (Bannan at p. 128, ln. 22 – p. 129, ln. 18).

389 U.S. 375, 378 (1967)(recognizing it is the “primary responsibility of the Board and not the courts” to strike the proper balance between asserted business justifications and employee rights.) that balancing of these interests is a delicate one and includes:

Weighing the interests of employees in concerted activity against the interest in operating his business in a particular and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer conduct.

NLRB v. ERIE Resistor Corp., 373 U.S. at 229. As discussed in more detail below, the business decision to terminate had no impact or chilling effect on other employees. (Elsenpeter at p. 144, ln. 22 – p. 149, ln. 15; p. 151, ln. 12 – p. 156, ln. 4; p. 156, ln. 23 – p. 158, ln. 5; Bannan at p. 98, ln. 17-20; p. 100, ln. 4 – p. 101, ln. 11; p. 105, ln. 7 – p. 106, ln. 10; p. 126, ln. 13 – p. 127, ln. 8; p. 131, ln. 1-8; p. 136, ln. 15 – p. 138, ln. 13; p. 140, ln. 14 – p. 141, ln. 19; Weston at p. 169, ln. 15 – p. 172, ln. 11; R. Ex. 16; R. Ex. 19, p. 11-16).

MORGAN HAD GROUNDS UNRELATED TO ANY PROTECTED AND CONCERTED ACTIVITY TO TERMINATE MR. BANNAN

A. THE LEGAL STANDARD OF REVIEW

The National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, makes unlawful the discharge of a worker because of union activity, 29 U.S.C. §§ 158(a)(1), (3); but employers retain the right to discharge workers for reasons unrelated to the employee's union activities. *N.L.R.B. v. Transp. Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469 (1983). When the General Counsel files a complaint alleging that an employee was discharged because of his union activities, the employer may assert legitimate motives for its decision. *Id.* In these types of unfair labor practice complaints, the General Counsel retains the burden of showing that the discharge is based in whole or in part on antiunion animus--that the employee's protected conduct was a substantial or motivating factor in the adverse action. *Id.* The General Counsel's burden is to prove the case by a preponderance of the evidence. *Id.*; *see also* 29 U.S.C. § 160(c). The burden then shifts to the employer to show that its actions would have been the same regardless of the alleged forbidden motivation. *Id.*

B. THE SUBSTANTIAL EVIDENCE IS UNCONTROVERTED THAT MORGAN'S TERMINATION DECISION WAS LAWFUL

To establish a prima facie case that Bannan's discharge violated Section 8(a)(1), the General Counsel has to make a showing "sufficient to support the inference that the protected activity was a "motivating factor" in the decision to discharge Bannan.²² Bannan was discharged for his failure **"meet the standards for attendance, adherence to policy and professionalism required of our managers. Management was Russell's career goal and I did not see a path forward for him with Morgan (emphasis added).** Rather the Judge finds that he made NLRA-protected comments to his co-workers and then the Judge tries to bootstrap those comments into a finding that the discharge was bound up in that conversation with his co-workers; giving absolutely no weight the uncontradicted evidence. The Judge also applied the wrong standard for determining whether Morgan's reasons for Bannan was false and a pretext for discrimination. In rejecting Morgan's legitimate reasons for terminating Bannan, the Judge violates Board precedent and "substitutes its own judgment for [Morgan's]."²³ *Retlaw Broadcasting Co.*, 310 N.L.R.B. 984, 992 (1993), *aff'd*, 53 F.3d 1002 (9th Cir. 1995) (the Board will not substitute its own judgment for the employer's" in employment decisions). "Management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision." *Sam's Club*, 349 N.L.R.B. 1007, 1009 (2007)(citation omitted). Because the Judge's second-guessing of Morgan's reasons is insufficient to hold that Morgan's legitimate reasons for terminating Bannan was pretextual or that Morgan would not have terminated him in the absence of anti-union animus, the discrimination findings must be reversed.

²² *Wright Line*, *supra*, 251 NLRB at 1089.

²³ Order, page 16 (concluding that in her judgment, Bannan's conduct did not warrant termination).

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. In relevant part, Section 7 of the Act gives employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities for the purpose of* collective bargaining or other *mutual aid or protection*". (Emphasis added). See, *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

Thus for employees to enjoy the protection of the Act under the language of Section 7 italicized above, two elements must be satisfied: The activity they engaged in must be "*concerted*," **AND** the concerted activity must be engaged in "*for the purpose of ... mutual aid or protections*." *Meyers I*, 268 at 497 held "..., to find an employee's activity to be 'concerted', we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Therefore, to warrant protection under Section 7, the activity must be both concerted **AND** undertaken for the purpose of mutual aid and protection – *Meyers I*, 268 at 494. *Meyers I* clearly use the conjunctive "and" meaning that all of the listed requirements must be satisfied – i.e., the activity must be both protected and concerted; not one or the other.

Activity is concerted if it is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. See *Meyers, supra*. It is concerted activity for an individual to raise a complaint that is a "logical outgrowth" of the concerns raised with the group. *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), *after remand*, 310 NLRB 831 (1993), *enfd.*, 53 F.3d 261 (9th Cir. 1995).

The Board's decision in *Alstate Maintenance*, 367 NLRB No. 68 (2019) sheds additional light on concerted activity. Under the *Alstate* decision to be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action. There, the NLRB confirmed the governing standards for determining whether activity is concerted are set forth in the Board's decisions in *Meyers I* and *Meyers II*. *Id.* at 3. In *Meyers I*, the Board held concerted activity requires an employee to be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Id.* The *Alstate* Board indicated that its decision began the process of restoring the law by overruling conflicting precedent that erroneously shields individual action and thereby undermines congressional intent to limit protection afforded under the Act to concerted activity for the purpose of mutual aid or protections. The *Alstate* Board went one step further in its first footnote expressly recognizing the existence of other questionable concerted activity cases in which statements about certain subjects, i.e., discussions about wages, working schedules and job security were found to be inherently concerted by virtue of their subject matter, implicitly suggesting that they may have been wrongly decided and expressing interest in reconsidering that line of precedent in a future appropriate case. This is such a case for the Board based on the arguments set forth herein.

"Thus under *Meyers II*, an individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of 'group activities' – e.g., prior or contemporaneous discussion of the concern between or among members of the workforce—warranting a finding the employee was indeed bringing to management's attention a

truly group complaint, as opposed to a purely personal grievance. Absent such evidence, there is no basis to find that an individual employee who complains to management about a term or condition of employment is acting other than solely by and on behalf of him- or herself.” *Id.* Bannan made no complaints to management; the only complaint to anyone in management was that of General Counsel’s witness Elsenpeter who was clear that there was no group activity, that Bannan was out only for himself and spoke on behalf of no one but himself.

As explained in *Mushroom Transp. Co, Inc. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). “Activity which consists of mere talk must, in order to be protected, be talk looking toward group action . . . If it looks forward to no action at all, it is more than likely to be mere ‘gripping’” *Mushroom Transp. Co, Inc.*, 330 F.2d at 685. *Mushroom Transp. Co., Inc.* is also relevant from a factual standpoint. There, the court noted an employee talked to other employees about their rights principally on holiday pay, vacations, and the company’s practice of assigning trips to drivers of other companies rather than its own drivers. *Id.* at 864. The court noted that if the activity’s “only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is individual, not a concerted, activity.” *Id.* at 685.

The facts in this case lack any indication (1) Bannan held a group meeting, (2) a discussion between multiple workers relating to a collective raise took place, or (3) a group of workers believed the company paid low wages. There is also no indication that anyone acted on Bannan’s comments. Thus, there is little, if any, indication that Bannan did anything more than advise other employees on individual issues, which would not qualify as concerted activity. In fact Elsenpeter’s testimony is clear that there was no concerted activity.

Moreover, Bannan never urged other employees to ask for a raise and the employees had no interest in Bannan's comments. In *Koch Supplies, Inc. v. NLRB*, 646 F.2d 1257, 1258 (8th Cir. 1981), the Eighth Circuit refused to enforce an NLRB order finding an employer violated the Act when the company discharged an employee for engaging in concerted activity. There, the employee protested the company's promise of vacation benefits to a new employee because she believed providing such benefits were contrary to established policy. *Id.* In refusing to enforce the order, the court noted, "No group action was ever discussed and all of the employees called to testify denied any interest in [the employee's] gripes." *Id.* The Court further noted that vacations being of common concern was not enough—"it must be shown that [the employee] intended her activities would relate to group action." *Id.* The Court's decision is consistent with the NLRB's stance that "**subject matter alone . . . is not enough to find concert.**" (Emphasis added). *Adelphi Institute*, 287 NLRB 104 (1988). Importantly, "individual gripes about wages are neither concerted nor protected." *Elston Elec. Corp.*, 292 NLRB 510, 528 (1989). The premise that Bannan and the other employees with whom he briefly and casually conversed were engaged in protected concerted activity is not supported by the facts. There is no evidence that as a group or individually any of them did anything or were about to do anything about the subject. The record fails to establish protected concerted activity on the part of any employee. Therefore Bannan's discharge because of what he said to other employees did not violate the Act. *Cf Buddies Supermarkets, Inc.*, 197 NLRB 407, *enforcement denied*, 481 F.2d 714 (5th Cir. 1973).

Bannan's claims are factually most similar to *Plastic Composites Corp.*, 210 NLRB 728 (1974). In that case, a recently hired employee, Mark George, was asked by other employees where he worked previously and what he had been paid. *Id.* at 738. George responded with a figure higher than the rates in the company's plant, which adversely affected the morale of co-workers.

Id. George was ultimately fired because he told other employees his pay level at his prior place of employment. *Id.* George maintained his conversation with other employees on the subject of his prior wages was protected concerted activity and his discharge was therefore unlawful. *Id.* The Board disagreed, determining no violation of the Act took place based on the brief and casual conversation George had with the other employees. *Id.* Specifically, the Board held, “There is no question but that they were engaged in conversation and that George was fired because of the effect, or possible effect, of the subject matter upon the other employees. But there is no evidence that as a group or individually any of them did anything or were about to do anything about that subject.” *Id.*

The evidence in this case fails to show that there was any protected concerted activity. The case should be dismissed.

MR. BANNAN’S TERMINATION IS NOT A VIOLATION OF THE ACT

A. THE LEGAL STANDARD OF REVIEW

The National Labor Relations Act, 29 U.S.C. § 151 et seq., makes unlawful the discharge of a worker because of union activity, 29 U.S.C. §§ 158(a)(1), (3); but employers retain the right to discharge workers for reasons unrelated to the employee's union activities. *N.L.R.B. v. Transp. Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469 (1983). When the General Counsel files a complaint alleging that an employee was discharged because of his union activities, the employer may assert legitimate motives for its decision. *Id.* In these types of unfair labor practice complaints, the General Counsel retains the burden of showing that the discharge is based in whole or in part on antiunion animus--that the employee's protected conduct was a substantial or motivating factor in the adverse action. *Id.* The General Counsel's burden is to prove the case by a preponderance of the evidence. *Id.*; *see also* 29 U.S.C. § 160(c). The burden then shifts to the employer to show that its actions would have been the same regardless of the alleged forbidden motivation. *Id.*

B. MR. BANNAN'S TERMINATION IS NOT A VIOLATION OF THE ACT

The General Counsel must prove by a preponderance of the evidence that the Respondent was unlawfully motivated in discharging Bannan. In order to prove that a discharge violates the Act under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983), the GC must meet its burden [Section 10(c) of the Act, 29 U.S.C. 160(c), expressly directs that violations may be adjudicated only "upon the preponderance of the testimony" taken by the Board. The Board's rules also state "the Board's attorney has the burden of proving violations of Section 8." 29 CFR § 101.10(b)] by initially showing that the employee's Section 7 activity was a motivating factor in the employer's decision to discharge the employee. Here, as pointed out above, there was no protected concerted activity by Bannan, so the first threshold element cannot be met. Even if that first threshold could be met, the uncontradicted evidence in the record is that Morgan would have taken the same adverse action even if protected activity did exist. *Wright Line*, 251 NLRB at 1089; *see also*, *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), *enf'd mem.* 127 F.3d 34 (5th Cir. 1997).

The facts of this case are that on October 4, when Heape approved the progression raise, he noted that Bannan was expanding his knowledge of construction and seeking to "understand Morgan's culture". (Heape at p. 29, ln. 3-13; GC Ex. 2; R. Ex. 1; R. Ex. 8). Morgan's culture is set forth in its social contract that applies to all of its employees. (Heape at p. 60, ln. 1-10; R. Ex. 1). In relevant part it sets forth the core values of Morgan's culture to include: acting with integrity; being accountable, and open and honest communication. When Heape heard from Weston on the 24th about Bannan's attendance, and overall work performance, he determined that Bannan was not meeting those standards – i.e., not a good fit for Morgan's culture. His termination

memo is straight forward, clear, and consistent with what he wrote on October 4 – only this time Bannan had specific information that Bannan was not meeting the standards of Morgan’s culture:

”It was my assessment that Russell’s track record to date was an indication that he could not meet the standards for attendance, adherence to policy and professionalism required of our managers. Management was Russell’s career goal and I did not see a path forward for him with Morgan” (emphasis added).

(Heape at p. 43, ln. 16 – p. 44, ln. 11; p. 44, ln. 22 – p. 45, ln. 20; p. 55, ln. 14-19; p. 57, ln. 15 – p. 59, ln. 4; p. 60, ln. 12-21; p. 63, ln. 1-5; Fields at p. 197, ln. 21 – p. 199, ln. 16; GC Ex. 4; GC Ex. 7; R. Ex. 1; R. Ex. 11, p. 12-13; R. Ex. 12). The discharge was a lawful discharge for lawful reasons. As he said in his termination memo, wages were not the reason for the termination. (GC Ex. 4; R. Ex. 12).

An employer does not violate the Act if any antiunion animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause.” *See also, Big Ridge, Inc. v. NLRB*, 808 F.3d 705, 713 (7th Cir. 2015)(under NLRB’s *Wright Line* analysis, NLRB must show that antiunion animus was substantial or motivating factor for the discharge; *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554 (8th Cir. 2015)(same); *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir 2011)(same).

As observed in *Electrolux Home Products, Inc.*, 368 NLRB No. 34, (8/2/2019) at *3 it is possible that the true reason might be a characteristic protected under another statute (such as the employee’s race, gender, religion, or disability), or it could be some other factor unprotected by the Act or any other law, which would be a permissible basis for action under the at-will employment doctrine, and finding that under all the circumstances of the case, we cannot find that the disparity in disciplinary treatment warrants an inference that the discharge was motivated by Mason’s union activities. Bannan was an at-will employee and the reasons articulated by Heape were proper. (R. Ex. 3; GC Ex. 4; GC Ex. 7; R. Ex. 1; R. Ex. 3; R. Ex. 11, p. 12-13; R. Ex. 12).

The evidence here is that wages played no part in the decision to terminate. As Heape testified/wrote in a contemporaneous memo written before the charge and Fields confirmed: “It was my assessment that Russell’s track record to date was an indication that he could not meet the standards for attendance, adherence to policy and professionalism required of our managers. Management was Russell’s career goal and I did not see a path forward for him with Morgan”. Under the Judge’s decision, Morgan, or for that matter any other employer, has no right to assess what standards a manager must meet. Under the Judge’s decision, it is perfectly permissible for a management candidate to know about a policy (attendance/call-in) and disregard it on at least two instances when that person as a manager would have to hold other employees to meet those requirements. Under the Judge’s decision, it is perfectly permissible for a management candidate to violate known policy. Under the Judge’s decision, it is perfectly permissible for that same management candidate not to hold to the standards of honesty and integrity as set forth in Morgan’s social contract. (R. Ex. 1). The Judge’s view (In her judgment, Bannan’s conduct did not warrant termination) as set out on page 16 of her decision, simply does not follow Board precedent.

This is an additional sustaining ground to dismiss the complaint.

THE ADMINISTRATIVE LAW JUDGE’S CREDIBILITY DETERMINATIONS ARE HOPELESSLY INCREDIBLE, SELF-CONTRADICTIONARY, OR PATENTLY UNSUPPORTABLE

A. THE LEGAL STANDARD OF REVIEW

Credibility may rely upon a number of factors including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that might be drawn from the record as a whole.

The judge must be evenhanded and apply the same standards in evaluating prior statements or testimony by the General Counsel or charging party witnesses and by respondent witnesses. *Alta*

Bates Medical Center v. NLRB, 687 F.3d 424, 437-38 (D.C. Cir. 2012), remanding 357 NLRB (2011). See *Terracon, Inc.* 339 NLRB 221 n. 2 246 (2003)(discrediting the General Counsel's witness notwithstanding the respondent's failure to corroborate the manager's testimony by calling another manager who attended the meeting). Moreover, an adverse inference is improper if the witnesses' testimony is unnecessary. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006)(judge abused his discretion by drawing an adverse inference from the respondent's failure to call a manager, as the circumstances indicated the manager was not called because his testimony was unnecessary, not because it was adverse).

**B. THE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT
THE JUDGE'S CREDIBILITY DETERMINATIONS**

Legitimate adjudication requires evenhanded assessment of testimony offered on behalf of the employer and the employee. The Judge here applies one standard to the Counsel for the General Counsel and another to Respondent. As an example of this bias, despite the *L.S.F. Transportation, Inc.* 330 NLRB 1054, 1060 n. 11 (2000) case cited by the Judge of giving an adverse inference when a witness is not questioned on damaging statements, she discredited Mr. Elsenpeter's affidavit that he signed while employed but makes no mention that the Counsel for the General Counsel did not question him about it after he called him as a witness and on cross affirmed everything in the affidavit even though he was no longer employed by Morgan. As the Judge did throughout the decision, she inferred inconsistencies to the affidavit and his testimony when the affidavit made no statement about a topic and suggesting that the fact that he did not have a particular statement in his affidavit but testified to a topic not in his affidavit permitted her to discredit the affidavit despite his affirmation as to its truth and veracity.

In fact, Bannan's testimony was evasive, contradictory, and not believable. See *McCarty Processors, Inc.*, 292 N.L.R.B. 359, 362 (1989) (the Board and the Judge discredited the witness'

testimony because of his “coyness and evasiveness which undermine[d] his veracity”). Demeanor is commonly understood to mean an individual’s “[o]utward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions.” *See* Black’s Law Dictionary, p. 442 (7th Ed. 1999). Proper assessments of “demeanor” are based on “observing the witnesses while they testified.” *Standard Drywall Products, Inc.*, 91 NLRB 544, 545 (1950).

Here Bannan effortlessly answered virtually all of the General Counsel’s direct examination queries, but then responded to equally simple cross-examination questions with delays, pauses, additional questions, recollection issues, and reported confusion. The implausibility of several key parts of his story further undercuts his creditability. It is simply implausible that he was in any way involved in helping Garcia secure his raise as he suggested. It is further implausible that while he remembered hearing about wages when he met with Heape and Fields in his termination meeting that he did not remember asking if the reason was because he talked about his wage increase. This is a college-educated individual who ran his own business for many years, and sought out a meeting with the vice-president that hired him to discuss his future to move into a salary management job at Morgan. The other witness called by the General Counsel did not support Bannan’s claims. Bannan simply should not be believed. This is a case that any kind of “selective analysis” is improper, especially where the inferences drawn from ignoring certain evidence are contrary to direct, unrebutted testimony. *See, e.g., NLRB v. Cutting, Inc.*, 701 F.2d 659, 665-69 (7th Cir. 1983). Bannan is not a credible witness and this tribunal should find his entire story to be without merit.

This is a case in which, among the several biases against the Respondent, the Judge overplayed her view of Weston’s presumed pay bias to Heape. This is not supported by the record –

in fact Heape reviewed/investigated the entire Bannan record including Bannan's deception or dishonesty in failing to inform him of his policy violations prior to the October 4 meeting, and his continued policy violation after that meeting. His independent decision to terminate Bannan unrelated to and not based on Weston's presumed pay bias, but on his determination that Bannan would not fit in Morgan's culture as a member of its management team (R. Ex. 1), is not an adverse action creating employer liability. *See, e.g. Staub v. Proctor Hospital*, 562, U.S. 411 (2011)

C. THE JUDGE IMPROPERLY SUBSTITUTED HER JUDGMENT FOR THE EMPLOYER'S

The Judge also applied the wrong standard for determining whether Morgan's reasons for Bannan was false and a pretext for discrimination. In rejecting Morgan's legitimate reasons for terminating Bannan, the Judge violates Board precedent and "substitutes its own judgment for [Morgan's]." ²⁴ *Retlaw Broadcasting Co.*, 310 N.L.R.B. 984, 992 (1993), *aff'd*, 53 F.3d 1002 (9th Cir. 1995) (the Board will not substitute its own judgment for the employer's" in employment decisions). "Management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision." *Sam's Club*, 349 N.L.R.B. 1007, 1009 (2007)(citation omitted). Because the Judge's second-guessing of Morgan's reasons is insufficient to hold that Morgan's legitimate reasons for terminating Bannan was pretextual or that Morgan would not have terminated him in the absence of anti-union animus, the discrimination findings must be reversed.

REINSTATEMENT AND BACK PAY IS NOT THE APPROPRIATE REMEDY

A. THE PROPOSED REMEDY IS IMPROPER

Section 10(c) of the Act is designed to preclude the Board from reinstating an individual who was discharged for misconduct. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203,

²⁴ Order, page 16 (concluding that in her judgment, Bannan's conduct did not warrant termination).

217 (1964). Indeed, that history shows Congress intended to preclude reinstatement and back pay for employees discharged for cause even if the grounds for termination were acts without authority to order the Respondent to reinstate Bannan and to pay him back pay. The Judge's finding that Bannan would not have been discharged but for the Respondent's unfair labor practice does not give rise to an exception to the statutorily compelled rule. Consistent with Section 10(c), the Board has held that it cannot order reinstatement or back pay for employees discharged for cause, even where that cause would not have been discovered absent the commission by the employer of an unfair labor practice. The Supreme Court in *Fibreboard* quoted as follows from Sec. 10(c)'s legislative history:

The House Report states that [Sec. 10(c)] was "intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H.R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947). The Conference Report notes that under § 10(c) "employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (interfering with war production) . . . will not be entitled to reinstatement." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947).

Fibreboard, 379 U.S. at 217 fn. 11. Consistent with Section 10(c), the Board has held that it cannot order reinstatement or back pay for employees discharged for cause, even where that cause would not have been discovered absent the commission by the employer of an unfair labor practice. Thus, in *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007), the employer violated Section 8(a)(5) by installing hidden surveillance cameras without giving the union prior notice and an opportunity to request bargaining. Subsequently, by means of the illegally installed cameras, the employer detected employees engaging in illegal drug use, and the employer discharged them. Although the drug use would not have been detected but for the employer's unfair labor practice, the Board found that Section 10(c) precluded reinstatement and back pay for the discharged employees

because their illegal drug use was “cause” for their discharge. Similarly, in *Taracorp Industries*, 273 NLRB 221 (1984), the Board withheld a make-whole remedy for an employee discharged for insubordination based on information obtained during an investigatory interview, even though the employer obtained the employee’s admission that he had refused to obey a work-related order after unlawfully denying the employee’s request for a *Weingarten* representative.

Here, Bannan’s discharge stemmed directly from his following failures - **he could not meet the standards for attendance, adherence to policy and professionalism required of our managers.** Section 10(c) bars reinstatement and back pay in this kind of fact pattern as *Anheuser-Busch* and *Taracorp Industries* make clear.

CONCLUSION

The issues in this case arise from an understanding of the uncontradicted evidence related to Morgan’s hiring, employment and termination of Bannan - Morgan determined that Bannan’s attendance, policy violations and lack of professionalism were not those required or expected of a Morgan manager. There has been no violations of the Act, and the company asks that the Complaint be dismissed in its entirety.

Burr & Forman, LLP
1221 Main Street, Suite 1800
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

By: s/Richard J. Morgan
Richard J. Morgan

Attorneys for Morgan Corp.

Columbia, South Carolina
October 22, 2020